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Nos. 03-334 and 03-343

IN THE

# Supreme Court of the United States

SHAFIQ RASUL, ET AL., PETITIONERS

v.

GEORGE W. BUSH, ET AL., RESPONDENTS.

FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL., RESPONDENTS.

**On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

## BRIEF OF *AMICUS CURIAE* ABDULLAH AL-JOAID IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

Whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba.

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## INTEREST OF *AMICUS CURIAE*

*Amicus curiae* Abdullah Al-Joaid is a Saudi Arabian citizen who is the brother of a Saudi national confined in Guantanamo Bay, Cuba. As a relative of a Guantanamo Bay detainee, *amicus curiae* has interests in these cases that are identical to those of Petitioners, who are relatives of Guantanamo Bay detainees from other countries (Britain, Australia and Kuwait). *Amicus curiae* respectfully submits this brief to inform the Court about the impact of these cases from the perspective of the families of the Saudi detainees currently held at Guantanamo Bay.[1]

## SUMMARY OF THE ARGUMENT

The families of the Saudi detainees bring a perspective to these cases that only the relatives of the other Guantanamo Bay detainees can share. The detentions have caused substantial hardship on the Saudi families because they are unable to contact those confined and there is no way of determining the accuracy of information available about their condition. The future of the detainees in the custody of the U.S. Government, whether or not they have committed any offenses, is still uncertain after two years of confinement. Saudi Arabia would prefer to have its nationals repatriated for investigation and possible trial and punishment under Islamic law and in Saudi courts. However, diplomatic efforts to date have been unable to achieve this result. The exercise of jurisdiction by U.S. courts over the detainees could facilitate a resolution to this matter.

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[1] The parties to both cases have consented to the filing of this brief, and the documents reflecting consent have been filed with the Clerk's Office. In addition, pursuant to Supreme Court Rule 37.6, *amicus curiae* affirms that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of the brief.

## ARGUMENT

### I. THIS COURT SHOULD HOLD THAT U.S. COURTS HAVE JURISDICTION TO CONSIDER CHALLENGES TO THE LEGALITY OF DETENTIONS OF FOREIGN NATIONALS IN GUANTANAMO BAY, CUBA

*Amicus curiae* respectfully submits that this Court should hold that U.S. courts have jurisdiction to consider challenges to the legality of the detentions of foreign nationals captured abroad and incarcerated in Guantanamo Bay, Cuba. *Amicus curiae* incorporates by reference the Petitioners' legal arguments demonstrating that jurisdiction exists. Absent a finding that jurisdiction exists, there may be no end in sight to the detainees' confinement. Jurisdiction over the legality of the detentions could expedite a resolution.

### II. COURT ACTION IS NEEDED TO ENSURE JUST TREATMENT OF THE DETAINEES

Saudi Arabia is seeking repatriation of its nationals for possible trial and punishment or their release if there is no evidence of involvement with terrorist or criminal activity. The families of the Saudi detainees believe that repatriation or release of the Guantanamo detainees is appropriate, in addition to being beneficial to U.S. interests. The exercise of jurisdiction by U.S. courts over the legality of the Guantanamo detentions that Petitioners request could encourage this result.

#### A. The Families of the Saudi Detainees Are Seeking Their Repatriation or Release

The events of September 11, 2001 shocked and outraged people in the United States of America and throughout the world. The Kingdom of Saudi Arabia was among the first of many voices condemning these horrific acts and expressing



sympathy for the innocent victims and their families.[2]

In denouncing these criminal acts as a violation of principles of human decency and a callous disregard for human life, the Kingdom reinforced its commitment in support of international conventions against terrorism. Its statements of denunciation expressed the doctrines of Islam, which forbid aggression and call for tolerance and peace.[3]

In the wake of the September 11 attacks, military operations in Afghanistan against al-Qaeda and the Taliban resulted in the arrest and confinement of approximately 127 Saudi nationals at the U.S. naval base in Guantanamo Bay, Cuba.[4] The U.S. Government concluded that these individuals were not entitled to due process under the U.S. Constitution or to treatment as prisoners of war under the Geneva Convention. This was so even though U.S. officials acknowledged that many likely had committed no offenses. *See* Greg Miller, *Many Held at Guantanamo Not Likely Terrorists*, L.A. Times, Dec. 22, 2002, *available at*

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[2] *See, e.g.*, Royal Embassy of Saudi Arabia, Wash., D.C., *Kingdom Condemns Attacks on United States* (Sept. 11, 2001), *available at* http://saudiembassy.net/2001News/Press/2001Press.asp ("Saudi Arabia strongly condemns such acts, which contravene all religious values and human civilized concepts; and extends sincere condolences to the families of the victims"); Royal Embassy of Saudi Arabia, Wash., D.C., *Kingdom Cancels National Day Celebrations* (Sept. 17, 2001), *available at* http://saudiembassy.net/2001News/Press/2001Press.asp (reporting that "senior religious and legal scholars of Saudi Arabia have also denounced the barbaric events of September 11").

[3] *See* Royal Embassy of Saudi Arabia, Wash., D.C., *Condemnation of Terrorism: Statement by H.E. Shaikh Salih bin Muhammad Al-Luheidan Chairman of the Supreme Judicial Council of the Kingdom of Saudi Arabia* (Sept. 14, 2001), *available at* http://saudiembassy.net/PressLink/01-spa-terrorism-01.asp.

[4] *See Team of Lawyers to Defend Saudi Inmates in Guantanamo*, Arab News, Apr. 29, 2003, *available at* http://www.arabnews.com.

http://www.latimes.com/la-na-gitmo22dec22,0,2294365.story; Stuart Taylor, Jr., *Bush Sees "Bad People,"* Legal Times, Jul. 28, 2003, at 62.

The fate of the detainees incarcerated in Guantanamo became uncertain and, as time passed, apprehension and concern about their welfare grew in Saudi Arabia. For over two years, families have been unable to contact those in confinement, and the families are alarmed about public reports concerning the detainees, the Guantanamo facility and the conditions under which the detainees are being held. Available information has included reports of inhumane and degrading treatment, attempted suicides and the possibility of death sentences.[5]

The response to the detentions among those directly affected has varied. Rather than pursue legal challenges in U.S. courts, the families of the Saudi detainees chose to seek a negotiated solution. In parallel with the official diplomatic efforts of their Government, the families of the Saudi detainees have been working with a group of senior Saudi lawyers and former diplomats, experts in international law, who are using their good offices to assist in resolving the issue of the detainees.[6]

The Saudi families' specific objectives have included, first and foremost, the release of any innocent persons detained in Guantanamo. With regard to those who might

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[5] *See, e.g.*, Monica Whitlock, *Legal limbo of Guantanamo's prisoners*, BBC News, May 16, 2003, *available at* http://news.bbc.co.uk/2/hi/americas/3034697.stm; Tania Branigan, *Camp Delta Briton claims racial abuse*, The Guardian, Jan. 12, 2004, *available at* http://www.guardian.co. uk/uk_news/story/0,3604,1120943,00.html.

[6] *See* Tania Branigan, *Saudi-U.S. Meeting Touches on Detainees*, Wash. Post, Sept. 6, 2003, at A3; *Team of Lawyers to Defend Inmates at Guantanamo*, Arab News, Apr. 29, 2003, *available at* http://www.arabnews.com.



have committed offenses, the families have requested, to the extent possible, their repatriation for interrogation, trial and punishment by Saudi authorities and courts. The Saudi families have not suggested that any of the detainees who have committed punishable offenses escape justice. The legal systems in Saudi Arabia and the United States share a common view of such acts, and punishment could be even more severe in Saudi Arabia under Islamic law than in the United States.

Saudi diplomatic efforts to reach an alternative resolution have yet to bear significant fruit. Despite mention by Secretary of State Colin Powell in May of an agreement with Saudi authorities for the return Saudi nationals (*see* United States Dept. of State, *Press Conference at the French American Press Club* (May 22, 2003), *available at* www.state.gov/secretary/rm/2003/20909.htm), most of the Saudi detainees remain in Guantanamo.[7] Furthermore, there has been no significant movement to release or try those in confinement under the procedures established by the U.S. Government for sorting the detainees, releasing the innocent, charging the others and bringing those charged to trial.[8] For

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[7] At that time, Secretary Powell discussed expediting the repatriation of people who were unlikely to have committed crimes but just "sort of got caught up in the war." United States Dept. of State, *Press Conference at the French American Press Club* (May 22, 2003), *available at* http://www.state.gov/secretary/rm/2003/20909.htm.

[8] The Ninth Circuit noted that the United States has subjected over six hundred captives to indefinite detention, without any means "to challenge their confinement, to object to the failure to recognize them as prisoners of war, to consult with legal counsel, or even to advance claims of mistaken capture or identity." *Gherebi v. Bush*, No. 03-55785, 2003 WL 22971053, at *3 (9th Cir. Dec. 18, 2003). The Court also took note of the position of top U.S. officials that the detainees may be held in their present circumstances for an undefined period of time that could stretch into decades. *Id.*

these reasons, *amicus curiae* and other relatives of the Saudi detainees have chosen to lend their support to the efforts of the families of other detainees to obtain a solution through the U.S. courts.

In the absence of a meaningful alternative, the Saudi families seek a resolution that provides the detainees with access to justice and due process in the U.S. courts rather than having them indefinitely incarcerated with no resolution in sight, or subjected to untested and controversial military procedures. *See* Kevin J. Barry, *Military Commissions: American Justice on Trial*, The Federal Lawyer, July 2003, at 24 ("Unless substantially modified to more closely reflect *current* court-martial principles and rules, these military commissions will not achieve the level of due process that is characteristic of American criminal justice."). A determination that U.S. courts have jurisdiction to consider the legality of the detentions should ensure the needed measure of justice and due process.

### B. Under Islamic Law, Detainees Would Be Interrogated, Tried and Punished If Found Guilty Consistent with Basic Principles of Justice

In construing the scope of due process rights and other protections for criminal defendants afforded by the U.S. Constitution, this Court has informed its decisions by considering the rights of individuals in other countries' legal systems. *See, e.g.*, *Lawrence v. Texas*, 123 S. Ct. 2472, 2481, 2483 (2003) (construing due process liberty interests with reference to decisions of the European Court of Human Rights); *Thompson v. Oklahoma*, 487 U.S. 815, 830 n.31 (1988) (plurality opinion of Stevens, J.) (recognizing "the relevance of the views of the international community in determining whether a punishment is cruel and unusual" under the Eighth Amendment); *McGowan v. Maryland*, 366 U.S. 420, 536 (1961) (Frankfurter, J., concurring) (referring to other countries' laws to assess rationality of Maryland



criminal statute under Due Process Clause). In considering these cases, the Court should be aware of the following legal principles under Islamic law, or Shari'a, which would be applied in Saudi Arabia if the detained individuals were subjected to interrogation, trial and possible punishment by Saudi authorities and courts. These principles are remarkably consistent with due process that is generally provided under U.S. law.[9]

1. Islamic law recognizes terrorism as a criminal offense and condemns the act of terrorism committed in any part of the world against any person.

2. Islamic law also teaches that terrorists should be severely punished. In keeping with these teachings and the international conventions against terrorism to which the Kingdom of Saudi Arabia subscribes, the position of the Saudi Government and the Saudi people is that those who commit terrorist acts should be punished. The families of the Saudi detainees recognize that their sons must be punished if, after receiving a fair trial and being able to present a defense, they are found guilty of committing acts that violate Islamic law.

3. Islamic law shares with other legal systems of the world the basic principle that guilt may not be presumed and that a person should be considered innocent until proven guilty.

4. Applying the presumption of innocence to the Guantanamo detainees requires investigating each case on its merits to know if there is evidence that a particular detainee

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[9] *See generally* Vogel, Frank E., *The Trial of Terrorists Under Classical Islamic Law*, 43 Harv. Int'l L.J. 53 (2002); Bassiouni, M. Cherif, *Protection of Diplomats Under Islamic Law*, 74 Am. J. Int'l L. 609 (1980).

is responsible for conduct that warrants a trial and possible punishment. The detainees should be judged on a case-by-case basis.

Consistent with these principles, in the absence of evidence that individual detainees have committed offenses, they should be set free. It is also consistent with Islamic law that the status of the detainees be resolved quickly so that those who are being improperly detained may be returned to their homes and reunited with their families.

Finally, Islamic law establishes that, if evidence demonstrates detainees may be responsible for terrorist acts or other crimes, they should be given a fair trial as quickly as possible with the opportunity to present a defense. It is important that the world community and the citizens of Saudi Arabia understand that those detainees who will be tried and subjected to punishment are being treated humanely and that there will be a just and decisive solution to their cases.

### C. The Detentions Have Damaged the Historically Friendly Relations Between the People of Saudi Arabia and the People of the United States

Beyond their immediate impact on the families of those kept in confinement, the detentions of Saudi nationals in Guantanamo have generated widespread negative public reaction in Saudi Arabia. The detentions are adversely affecting many aspects of Saudi relations with Americans, including business and commercial dealings, tourism and even medical care. By giving the Guantanamo detainees neither rights under U.S. law nor treatment as prisoners of war under the Geneva Convention, the United States has altered the perceptions of Saudi citizens of the U.S. commitment to human rights and principles of due process. With the indefinite confinement of Saudi nationals in Guantanamo without the protections of law, the historically strong friendship between the people of Saudi Arabia and the United States continues to suffer.



Negative Saudi perceptions of the situation in Guantanamo cannot be easily dismissed when these same perceptions are shared by U.S. courts. In *Gherebi v. Bush*, No. 03-55785, 2003 WL 22971053, at *3 (9th Cir. Dec. 18, 2003), the U.S. Court of Appeals for the Ninth Circuit recently characterized the U.S. Government's position as "inconsistent with fundamental tenets of American jurisprudence." The Court described the current situation as potentially allowing "unchecked authority to imprison indefinitely any persons, foreign citizens included, on territory under the sole jurisdiction and control of the United States, without permitting such prisoners recourse of any kind to any judicial forum, or even access to counsel, regardless of the length or manner of their confinement." *Id.*

One reason that the families of the Saudi detainees have advocated that the detainees be repatriated for interrogation, criminal proceedings and punishment in accordance with Islamic law is because a judgment by a Saudi court would be more readily accepted by the Saudi people, including the families of the detainees. A verdict by a Shari'a court would prevent concerns or misunderstanding by the families and citizens of the Kingdom that justice is not being fairly administered, perceptions which can often occur between cultures even if such is not the case. However, it is very difficult to expect any country to accept a legal judgment of another if the government of the other country is free to do with foreign nationals "as it will, when it pleases, without any compliance with any rule of law of any kind, without permitting him to consult counsel, and without acknowledging any judicial forum in which its actions may be challenged." *Id.* at *13. Indeed, the Court in *Gherebi* found the Government's position as to its authority over the detainees to be "so extreme that it raises the gravest concerns under both American and international law." *Id.*

Although the United States was reported to have agreed in May 2003 to the release of nearly two-thirds of the Saudi detainees to Saudi authorities pursuant to a negotiated agreement, in fact, only five were released. *See US to Release More Saudi Prisoners*, Arab News, May 26, 2003, *available at* http://www.arabnews.com. The Saudi families will continue to pursue a negotiated solution to the detentions that includes repatriation. However, these diplomatic efforts cannot substitute for the due process rights of the individuals detained even if they are intended to achieve the same result.

A more acceptable solution to the *status quo* is a mechanism that requires the immediate release of innocent detainees, decisions by the U.S. Government as to the offenses with which others will be charged and the scheduling for trial or repatriation of those who are legitimately suspected of committing crimes. U.S. federal court jurisdiction over the Guantanamo detentions will both further the interests of justice and make great strides towards repairing the damage to the relationship between the Saudi and American people resulting from the ongoing detentions.



## CONCLUSION

For the reasons discussed above, this Court should reverse the judgment of the court of appeals and remand these cases for further proceedings.

Respectfully submitted,

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